

Nadler Examines the Electronic Communications Privacy Act and its Application to Location-Based Technologies

Thursday, 24 June 2010

WASHINGTON, D.C. - Today, Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, chaired a hearing on Electronic Communications Privacy Act (ECPA) Reform and the Revolution in Location-Based Technologies and Services. Members of the Subcommittee were educated about location-based technologies and services and the current law's application to them.

"Today, we continue our examination of whether ECPA still strikes the right balance between the interests and needs of law enforcement and the privacy interests of the American people," said Nadler. "Our task will be a challenge: to find the appropriate balance between privacy and law enforcement interests, to protect the public while preserving consumer privacy and confidence, and to support rapid technological innovation yet discern standards for law enforcement access that will not become outdated with each new generation of technology."

ECPA, originally enacted in 1986, provides the standards for law enforcement access to electronic and wireless technologies. It was developed in order to reestablish a balance between privacy and law enforcement needs, which Congress found had been upset by the development of communications and computer technology. The law regulates how the government can obtain access to wire, electronic and stored communications, and customer records.

This was the Subcommittee's second ECPA reform hearing. The first hearing generally introduced the Subcommittee to ECPA reform issues arising from the development of new technologies that did not exist when the statute was enacted. Today's hearing focused on cell site data and explore how the growth in cell phone location technology and associated mobile services may necessitate certain reforms to the law.

Witnesses at the hearing were: Matt Blaze, Associate Professor, University of Pennsylvania; Michael Amarosa, Senior Vice President, Public Affairs, TruePosition; Richard Littlehale, Assistant Special Agent in Charge, Technical Services Unit, Tennessee Bureau of Investigation; Marc J. Zwilling, Zwilling Genetski, LLP; and, The Honorable Stephen Wm. Smith, United States Magistrate Judge, Southern District of Texas.

The following is the text of Nadler's opening statement, as prepared:

"Today's hearing is the second in which this Subcommittee will consider the statutory framework Congress established in the 1986 Electronic Communication Privacy Act (ECPA) in light of the enormous technological advances in electronic communications in the twenty-four years since ECPA's passage.

"While the first hearing was a general introduction to several ECPA reform issues that should be examined, this hearing will focus specifically on advances in cellular location based technologies and related services, and how such technologies, while enriching our lives, can provide more precise and, to many of us, more sensitive information about where we may be located at any given time.

"So, today, we continue our examination of whether ECPA still strikes the right balance between the interests and needs of law enforcement and the privacy interests of the American people. If we conclude from this examination that the balance of interests between law enforcement and personal privacy must be struck more finely, we will take the necessary legislative action. If we embark on that course, we must bear in mind the exigencies and complexities of the security environment in which law enforcement must act.

"Moreover, if we act, we must do so with the full knowledge that any legislative changes to ECPA must, nevertheless, sustain the public's confidence in the security of their communications or it could harm both the robust market for cell phones and the rapid innovation that is fundamental to that market's health. Because ECPA inevitably involves the interaction of all these important and complex considerations, we are taking the time, through multiple hearings, to educate ourselves carefully and fully before engaging in legislative action.

"This Subcommittee's exploration of where the appropriate balance may lie with respect to location information must surely include a lesson in location based technologies and services. After all, when ECPA was passed back in 1986, approximately eight years before the GPS system was fully activated for public use, the only options one had for locating oneself on the road were still a road atlas or a gas station. Now, as we will see, the GPS is supplemented by an array of different location technologies and the myriad applications they support.

"We are honored to have certain witnesses here today who are experts in these technologies. They can give us the necessary background to embark upon an understanding of how they work, what types of information and records they can generate and store, and how they can be of assistance to law enforcement in appropriate circumstances.

"This initial educational effort is, in my view, not only warranted, but essential, before we undertake any effort at amending or otherwise reforming ECPA. After we hear the terrain described, we will move on to other questions today. Namely, how is ECPA currently being applied to these location-based technologies and services by the courts?

"Without stealing his thunder, we have one very distinguished witness here today who will tell us - in the most respectful way, I'm sure - that Congress needs to give better guidance to the courts with respect to the standard governing law enforcement access to certain types of location based information. He is a Magistrate Judge working 'in the trenches' who has grappled with how to apply ECPA to law enforcement requests for various types of location based information.

"In many respects, at least for the moment, the testimony and discussions today may raise more questions than they answer. Since we are to hear about technologies, both existing and yet to come, that are revolutionary - certainly by 1986 standards - I want to acknowledge that our task will be a challenge: to find the appropriate balance between privacy and law enforcement interests; to protect the public while preserving consumer privacy and confidence; to support rapid technological innovation yet discern standards for law enforcement access that will not become outdated with each new generation of technology.

"As I indicated, this journey will, at least initially, take the form of a dialogue, and this Subcommittee needs the assistance and input of all stakeholders - law enforcement, private industry and civil liberties groups alike - to get this right.

"We look forward to speaking with you formally or informally and seeing you at future hearings."